IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 780 of 2002
with
CIVIL APPLICATION NO. 3006 OF 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

ORIENTAL INSURANCE CO LTD.

Versus

GUJARAT STATE WARE HOUSING CORP.

Appearance:
1. First Appeal No. 780 of 2002
MR KK NAIR for Petitioner No. 1
..... for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 4 /12/2002

C.A.V. JUDGEMENT

The Oriental Insurance Company Limited-appellant (original defendant) has filed this appeal against judgement and decree dated 17.8.2001 passed by the

learned City Civil Judge, Ahmedabad in Civil Suit No. 3769 of 1990. The learned judge by his impugned judgement held that the suit filed by Gujarat State Ware-Housing Corporation -plaintiff be decreed and the appellant-defendant Insurance Company shall pay a sum of Rs. 43,471.20 with interest at the rate of 12% per annum from the date of the suit till the recovery to the plaintiff and also cost to the plaintiff.

2. The facts giving rise to this application are as under:

2.1 The plaintiff is a statutory Corporation established with an object of providing scientific godown facilities to the private and public sector at competitive rates and it has various such centres all over the State of Gujarat. It has godowns in Ahmedabad and godown at Balaji Estate No. 17 was used for storing fertilizer bags of Gujarat State Fertilizer Co. Ltd., Vadodara (GSFC for short), the loss of which is the subject matter of of the present appeal.

2.2 The defendant Insurance Company issued policy namely Fidelity Insurance Policy covering the period from 1.4.1987 to 31.3.1988 agreeing to indemnify the plaintiff Corporation against the risk subject to the limit of Rs. 15 lakhs from 1.4.1987 covering the risk under Fidelity.

2.3 From the record it appears that on 4.1.1988 during the course of physical verification at godown No. 17 at Narol, it was noticed that 354 bags of fertilizers belonging to GSFC were missing out of the total number of 36,906 bags and the said fact was notified to the defendant in the letter dated 19.1.1988 and 29.1.1988. As the defendant Corporation refused to make the payment of the claim made by the plaintiff of the loss suffered of Rs. 43,471.20, the plaintiff filed suit for declaration as well as recovery.

2.4 The Oriental Insurance Company Limited has filed written statement at Exh. 15 and contended inter alia stating that the suit of the plaintiff is not legal and proper. It was further stated that the plaintiff is required to give notice in writing to the defendant within 14 days of the discovery of any fact in respect of which the claim may arise as per condition No. 1 of the Fidelity (Floating) Insurance Policy and then three months after such a notice, full details of the claims with the proof needs to be furnished to the Company. In the event of the failure, no claim can be sought for. It was further contended that there is no right of recovery

when the plaintiff failed to adopt to the said condition No. 2. As no particular person has been identified of having committed embezzlement or fraud so much so that, policy also could not lay its hands on any of the accused, filing a summary before the Metropolitan Court, no charges can be said to have been proved. According to the defendant, no precaution has been taken by the plaintiff company and since there is a breach of policy of fidelity, the suit needs to be dismissed.

2.5 the learned judge by her impugned judgement and decree, after considering the evidence on record, came to the conclusion that the plaintiff proved the loss of 354 bags due to infidelity of its employees and the defendant failed to prove that the plaintiff breached the terms of policy as averred and ultimately the suit of the plaintiff was decreed in favour of the plaintiff.

3. Mr. K.K. Nair, learned advocate for the appellant had invited my attention to the policy of the Insurance Company in this behalf. He has invited my attention to proviso (ii) of main Policy on page No. 1 and also condition No. 1 attached to the said policy and condition No. 9 which is behind the Schedule of the policy.

Proviso (ii) reads thus:

(ii) the Insured shall have no right of recovery against the Company until each defaulting employee has been identified by name.

Condition No. 1 - The employer shall within fourteen days of any act on the part of any one of the employees or any matter in respect of which a claim may arise or might have arisen given notice in writing to the Issuing Office of the Company accompanied by all available particulars and within three months after such notice the employer shall deliver to the Company full details of his claim and shall furnish proof of the correctness of such claim.

Condition No. 9 - The due observance and fulfilment of the terms provisions conditions and endorsements of this Policy in so far as they relate to anything to be done or complied with by the employer and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the insurer to make any payments under this guarantee.

4. On the basis of the said conditions of policy the learned counsel for the appellant submitted that there is breach of condition of policy particularly proviso (ii) of the policy because defaulting employee is not identified. In support of his submission the learned counsel for the appellant has invited my attention to the judgement under appeal in which it is stated that there was a possibility of involvement of employees and the said loss was caused due to the act of dishonesty or fraud or misappropriation by the insurer employees. He further submitted that condition No. 1 was not applied and consequences are stated in condition No. 9 which provides condition precedent for fulfilling the liability.

5. He further submitted that negligence of respondent plaintiff resulting in loss shows that there was no security guards appointed for the godowns and the keys of the godown were accessible to other persons than the Ware-House Manager. In that connection, he has invited my attention to the judgement under appeal where the learned judge has observed that how carelessly the affairs were being managed which has resulted in the alleged loss.

6. In view of the aforesaid facts situation, he submitted that if the trial court was inclined to pass a decree, interest and cost should not have been awarded. He further submitted that alternatively the case being not one filed by an individual person and that too not being one under any social legislation and in view of the breach of conditions, no interest should have been awarded or in the alternatively interest should not have been awarded at 12% in view of the dwindling rate of Reserve Bank of India interest rate and it should have been granted at 6% as provided under S. 34 of the C.P.C.

7. In this case it is true that as provided in condition No. 1 of Fidelity (Floating) Insurance Policy, the insured has not informed the defendant company regarding their discovery of the act of missing of the bags due to the act of any of his employees in respect of which the claim has arisen at a future date. Since the first such discovery is said to be on 14.12.1987, whereas the date of intimating the insurer is 19.1.1988 and therefore in stricto sensu condition No. 1 has not been complied with where issuing office of the company was required to be intimated about such a discovery. However, within three months after such notice, the plaintiff delivered the claim with full details. It

further emerges from the evidence on record that, after having discovered the fact of missing of the bags and as reported also in the police report, private detective agency was handed over the task of investigating into the missing stock and the report was submitted on 18.1.1988 to the plaintiff and thereafter, on the very next day, the defendant has been informed and a complaint has also been lodged being Criminal Case no. 8 of 1988 on 22.1.1988. The whole idea of serving the notice to the defendant company within 14 days is to check any manoeuvering on the part of the insured. It may be noted that the plaintiff is a statutory Corporation. It is obligatory on the part of its officers to look into the matter with a greater detail and scrutinise the whole thing meticulously. Since there is no allegation of concoction of the claim, condition No. 1 which is emphasised in the given set of facts and circumstances, can be said to be directory and non-intimating the defendant company within 14 days of the time by the plaintiff would not permit the defendant to negate the legitimate claim on this basis alone.

8. In this case the surveyor who was appointed by the defendant Company acted for and on behalf of the defendant company and gave the report and reliance is also sought to be placed upon the same and the notes made in the said report and therefore when it emerges clearly that, the act of missing of 354 bags stocked in the godown by GSFC could be attributed to the employees of the plaintiff company, the terms laid down in the Fidelity Insurance Policy are attracted. In view of this the plaintiff succeeded in proving loss of 354 bags of urea belonging to GSFC on account of infidelity of its employees and the defendant did not succeed in proving the breach of terms of the policy.

9. The learned counsel for the appellant has also invited my attention to the judgement of the Hon'ble Supreme Court in the case of NEW INDIA ASSURANCE COMPANY VS. KAMLA AND OTHERS reported in 2001(2) TAC 243 (S.C.) = 2001(4) SCC 342. The learned counsel for the appellant has also invited my attention to paragraph Nos. 17, 18, 19 and 20 of the judgement of the Hon'ble Apex court and in paragraph Nos. 21 and 22 the Hon'ble Supreme Court has observed thus:-

"Para 21 - A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are

intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer was not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

Para 22 - To repeat, the effect of the above provisions is this: When a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured."

9.1 In para 25 the Hon'ble Supreme Court has further held thus:

"The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due inquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition."

10. I have also considered the judgement of the Hon'ble Supreme Court which has been cited by the learned

counsel for the appellant. On the basis of the judgement, it was contended that if there is any breach of conditions then the Insurance Company is not liable to make payment. In that case the question was that the vehicle was driven by a person holding a sham licence and qua the third party, though the Supreme Court answered in the affirmation, qua the insured it was answered in negation. On the line of this analogy, it was argued that in the event of breach of condition made by the insured, the insurance company is entitled not to pay to the insured.

11. However in this case though the discovery of the fact of missing bags was made on 14.12.1987, the plaintiff as a statutory Corporation was required to verify the whole fact and the physical verification of all bags - stocks deposited by GSFC could be completed on 14.1.1988 and thereafter since, it reached the conclusion of the missing of the impugned bags, the intimation to the defendant company on 19.1.1988 cannot be termed as breach of the condition. A statutory provision under the Motor Vehicle Act provided for a valid licence for those who are driving the motor vehicle on public road and therefore in violation of statutory provision and the renewal of the fake and sham licence by the driver of the offending vehicle cannot be equated with the procedural requirement of intimating by way of notice in the event of the theft or act of infidelity noticed by the insured. Therefore, this authority shall not come to the rescue of the defendant.

12. In my view the real decision which is relevant in this case is the judgement of the Hon'ble Supreme Court in the case of SKANDIA INSURANCE CO. LTD. VS. KOKILABEN CHANDRAVADAN & ORS. reported in 1987(2) SCC 654 = AIR 1987 SC 1184. In that case the accident in question took place on 14.11.1964. The truck had come from Barejadi and had been unloaded at Baroda. The driver had gone for bringing snacks from the opposite shop leaving the engine running. The ignition key was in the ignition lock and not in the cabin in the truck as alleged by the driver. The driver had handed over control of the truck to the cleaner.

12.1 In view of the aforesaid facts, the Hon'ble Supreme Court held that mere breach of does not abslove insurer of his liability. He has to establish that insured himself was guilty of committing breach of promise in contract of insurance. In para 14 on page 1190, the Hon'ble Supreme Court has observed thus:

"xxxxx The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation" (see: Collins English Dictionary). It is therefore abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is not (sic) duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation or infringement on the part of the promisor must be a wilful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach.

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Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact tht the promisor (the insured) committed a brach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself it cannot be said that the insurer is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insured can hide under the umbrella of the exclusion."

13. Thereafter, the Hon'ble Supreme Court has considered discussion made in paragraph 239 of Breach of Contract by Carter (1984 Edition) under the head "Proof of Breach" and the Hon'ble Supreme Court held on page 1192 as under:

"Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House of lords in Suissee Atlantique Societyd' Armament Maritime, S.A. Vs. N.V. Rotterdamche Kolen Centrale (1967) 1 AC 361 at pp. 393, 412-413, 427-428, 430. Accordingly, wide

exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract."

14. The aforesaid decision has been again confirmed by larger Bench of 3 Judges of the Hon'ble Supreme Court in the cases of, namely SOHAN LAL PASSI VS. P. SESH REDDY & ORS. reported in (1996) 5 SCC 21, NEW INDIA ASSURANCE CO. VS. KAMLA & ORS. reported in (2001) 4 SCC 342 and B.V. NAVARAJU VS. ORIENTAL INSURANCE CO. LTD.. reported in (1996) 4 SCC 647.. In view of the same, the offending vehicle cannot be equated with the procedural requirement of intimating by way of notice in the event of theft or act of infidelity noticed by the insured and therefore also the contention of the learned counsel for the appellant is not applicable in this case.

15. I have considered the facts of the case. Fidelity Insurance Policy would squarely cover the claim of the plaintiff for the reason that the defendant company has ensured to indemnify the insured against the loss sustained by reason of act of embezzlement. The two persons who have been reported to have committed the act in the report of the surveyor who are the employees who fall under the description of the employees given in the Schedule of the policy and the amount of indemnify is upto the limit of Rs. 15 crore whereas the claim sought for by the plaintiff is much less. These employees who have been entrusted the task of taking care of the stock are reported to have embezzled the said and therefore the refusal on the part of the defendant company to pay the said amount which have been deducted by GSFC while making the payment to the plaintiff, is an unjust act.

16. The surveyor who was appointed by the defendant company acted for and on behalf of the defendant company and gave the report and reliance is sought to be placed upon the same and the notes made in the said report and when it emerges clearly that the act of missing of 354 bags stock in the godown by GSFC could be attributed to the employees of the plaintiff company, the terms laid down in the Fidelity Insurance Policy are attracted.

17. The plaintiff Corporation has produced the correspondence of the GSFC to substantiate the fact that it has paid the amount of missing bags to the GSFC to the tune of Rs. 44,024/- and accordingly the claim has been lodged with the defendant Insurance Company by the plaintiff.

17A I have considered the entire evidence on record, policy of the insurance and also judgement of the Hon'ble Supreme Court in the case of NEW INDIA ASSURANCE COMPANY VS. KAMLA AND OTHERS (supra) produced by the learned counsel for the appellant. I have also considered the judgement of the Hon'ble Apex Court in the case of SKANDIA INSURANCE CO. LTD. VS. KOKILABEN CHANDRAVADAN & ORS. (supra) which I have reproduced and also other judgements. The judgement in the case of SKANDIA INSURANCE CO. LTD. (supra) has been followed in the case of SOHAN LAL PASSI VS. P. SESH REDDY & ORS. (supra) and other cases. In my view whatever breach which is alleged by the Insurance Company is not fundamental breach. The said breach will have to be read down in connection with the facts and circumstances of the case and which is inconsistent with the main purpose or object of the contract. Here the object is to indemnify the person who has suffered a loss and that object will have to be achieved by reading down in this behalf.

18. I have gone through the judgement of the learned judge. The learned judge has given very cogent and convincing reasons on the ground that the plaintiff succeeds in proving loss of 354 bags and allowed the suit. Therefore, I do not see any reason in disturbing the said view of the learned judge.

19. In the result, the appeal is dismissed with no order as to costs.

In view of the order passed in the main matter, no orders are passed on the Civil Application. It accordingly stands disposed of.

(K.M. MEHTA, J)

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